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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 1346 108

HARRY EDISON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Supreme Court of the United States:

The petitioner, Harry Edison, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the Tax Court of the United States in the cause styled "Harry Edison, Petitioner, v. Commissioner of Internal Revenue, Respondent."

JUDGMENT AND APPLICATION FOR CERTIORARI.

The judgment of the United States Circuit Court of Appeals was entered on April 23, 1945 (R. 78), and this petition is filed within three months thereafter.

SUMMARY STATEMENT OF FACTS.

On May 24, 1938, petitioner created two trusts which by their terms were irrevocable (R. 8-25). One was for the benefit of petitioner's son, Sidney J. Edison, and his issue. The other was for the benefit of petitioner's daughter, Edna L. Edison, and her issue. No right of reverter was retained by the petitioner. The trustee was directed to pay over all or such portion of the net income as the trustee deemed advisable or necessary to the child for whose benefit the trust was created during his or her lifetime for such child's comfort, support, education or care. Any portion of the net income not thus paid over was to be added to the corpus. If the trustee deemed it advisable or necessary for the greater ease or comfort or for the business training of such child or to help such child start in business or some other vocation or profession or for such child's education, maintenance or care to encroach upon the corpus of the trust, the trustee was authorized to pay over all or such portion of the trust as the trustee should deem advisable or necessary for such purpose. Upon the death of the child, the corpus is to go to his or her issue (R. 9-12, 17-19).

The Sidney J. Edison trust provides that should he die without issue then the corpus is to go to his sister, Edna L. Edison, and upon her death is to go to her issue. If she dies without issue, then to her heirs at law. If Sidney J. Edison should leave no issue and his sister should have predeceased him without leaving issue surviving her, then the corpus is to go to the heirs at law of Sidney J. Edison.

The Edna L. Edison trust provides that should she die without issue then the corpus is to go to her brother, Sidney J. Edison, and upon his death is to go to his issue. If he dies without issue, then to his heirs at law. If Edna L. Edison should leave no issue and her brother should have predeceased her without leaving issue surviving him, then the corpus is to go to the heirs at law of Edna L. Edison.

The Edna L. Edison trust further provides that until she attains her majority the trustee should permit the net income of said trust to accumulate and as it accumulates it should become part of the corpus of the trust.

Petitioner retained no right to receive any part of the income or corpus of the trust.

The son was in his twenty-third year at the time, and the daughter in her eighteenth year. Petitioner was a resident of Missouri. The son had his residence in New York and was married in 1940. The daughter was unmarried during the period involved and had her home with her parents (R. 37).

The trusteed property consisted almost wholly of shares of capital stock in Edison Brothers Stores, Inc., a Delaware corporation, which was engaged in the operation of retail shoe stores throughout the United States but had its principal offices in St. Louis, Missouri, and of which petitioner was the president, a director, and a large stockholder (R. 36). The stock was listed on the New York Stock Exchange. Prior to the creation of the trusts, petitioner was the owner of 40,576 shares of the total 385,490 shares of common stock which the corporation had outstanding, and of 50 shares of the total of 60,000 shares of outstanding preferred stock. He originally put a total of 5,000 shares of the common stock into the two trusts and later added another 2,500 shares to the son's trust and 2,000 shares to the trust for the daughter (R. 37).

Petitioner named himself as the initial trustee and provided for successor trustees. He, also, reserved the right to designate trustees to serve in lieu of those named (R. 8, 14, 17, 22).

He vested the trustees with broad administrative powers (R. 13, 21, 22).

Petitioner reported the gifts to the trusts in gift tax returns for the years in which the gifts were made (R. 38).

During the taxable years involved the capital stock, both common and preferred, of Edison Brothers Stores, Inc., was listed on the New York Stock Exchange. During all of said years petitioner was president and a director of the Company.

Petitioner acted as sole trustee under each trust during the years involved. For each of the taxable years 1938 to 1941, inclusive, petitioner filed a fiduciary income tax return for each of the trusts, and as trustee paid taxes on the amount of the undistributed income. The income received by petitioner as trustee of these trusts was kept by him in separate bank accounts (R. 38, 39).

There has been compliance with all conditions required to protect the Government against having to refund the taxes paid by the trustee in the event petitioner should prevail in this proceeding (R. 43).

Respondent included all of the income of the two trusts as a part of petitioner's income from the years 1938 to 1941, inclusive, and determined deficiencies in petitioner's tax for said years in the amounts hereinbefore stated.

Thereupon, petitioner filed with the Tax Court of the United States his petition for a redetermination of said deficiencies and the Tax Court held that the trust income was taxable to petitioner within the doctrine of Helvering v. Clifford, 309 U. S. 331, under Section 22 (a) of the Internal Revenue Code and sustained the Commissioner's determination of deficiencies (R. 44-52). (The decision was not reviewed by the full Tax Court.)

DECISION OF LOWER COURT.

The Court of Appeals affirmed the decision of the Tax Court asserting that it could not say that the Tax Court's appraisal of petitioner's powers is without a rational basis of taxability under section 22 (a) and wholly arbitrary (R. 66-77).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 939, 28 U. S. C. A. 347. Helvering v. Clifford, 309 U. S. 331; Helvering v. Stuart, 317 U. S. 154.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The 5th Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury * * * nor be deprived of life, liberty or property without due process of law; * * *"

The 16th Amendment to the Constitution of the United States provides:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

26 U. S. C. A., Internal Revenue Code, Section 22 (a), provides:

"Sec. 22. Gross income.

"(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

26 U. S. C. A., Internal Revenue Code, Section 161, provides:

"Sec. 161. Imposition of tax.

"(a) Application of Tax.—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including— * * *

"(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

"(b) Computation and Payment.—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor)."

26 U. S. C. A., Internal Revenue Code, Section 162, provides as follows:

"Net Income.

"The net income of the estate or trust shall be com-

puted in the same manner and on the same basis as in the case of an individual, except that— * * *

"(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary;

"(d) Rules for Application of Subsections (b) and (c)—For the purposes of subsections (b) and (c)—

"(1) Amounts distributable Out of Income or Corpus.—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid,

credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust. * * *"

26 U. S. C. A., Internal Revenue Code, Section 167 (c), provides:

"Income of a trust shall not be considered taxable to the grantor under sub-section (a) or any other provision of this chapter merely because such income, in the discretion of another person, the trustee, or the grantor acting as trustee or cotrustee, may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. * * *"

QUESTION PRESENTED.

Is the income of irrevocable trusts taxable to the grantor under 26 U. S. C. A., Internal Revenue Code, Section 27 (a), where the grantor

(a) retained no right to share in the income or corpus of the trusts,

(b) created such trusts for the benefit of his son and daughter and their issue and appointed himself as the initial trustee,

(c) acted as such during the years in question,

(d) vested in the trustee broad powers of management and investment,

(e) directed the trustee to pay over to the primary beneficiary for whom the trust was created during his or her lifetime all or such portion of the net income of the trust as the trustee in his uncontrollable discretion should think advisable or necessary for the comfort, support,

education or ease of said primary beneficiary and provided that any portion of the income not thus paid over should be added to the corpus of the trust fund,

(f) provided in the trust instruments that, if in the uncontrollable discretion of the trustee, the trustee should deem it advisable and necessary for the greater ease or comfort of the primary beneficiary or for his or her business training or to help him or her start in business or some other vocation or for his or her education, maintenance or care to encroach upon the corpus of the trust for the benefit of the primary beneficiary and pay over such portion thereof as the trustee shall deem advisable or necessary, and

(g) reserved the right to designate a trustee or trustees to act in lieu of those appointed trustees under the trust instruments,

and where the son was twenty-three years old when the trust was created and the daughter attained her majority during the last taxable year in question and no part of the income or corpus was paid her or used for her benefit during her minority?

REASONS RELIED UPON FOR GRANTING THE WRIT.

(a) To tax petitioner in this case on the income of the trusts involved is in violation of the Constitution of the United States and the Amendments thereto, particularly Art. I, Sec. 2, Cl. 3, and Sec. 9, Cl. 4 of the original Constitution and the Fifth and Sixteenth Amendments to the Constitution.

(b) The decision of the Circuit Court of Appeals for the Eighth Circuit is in direct conflict with the decisions of this Court in Helvering v. Stuart, 317 U. S. 154, wherein

this Court held that broad powers of management in trustees, even though without adverse interests, point to complete divestment of control as does the impossibility of reversion to the grantors, and further held that economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme and that the non-material satisfactions (gifts—contributions) of the donor are not taxable as income; Eisner v. Macomber, 252 U. S. 189, which held that income to be taxable under the Sixteenth Amendment must be gain derived by the taxpayer for his separate use, benefit and disposal; Hoeper v. Tax Commission, 284 U. S. 206, and Heiner v. Donan, 285 U. S. 312, wherein the court held it to be a denial of due process of law to tax one person upon the gain and profits of another and condemned such exaction as spoliation, not taxation, and Reinecke v. Northern Trust Co., 278 U. S. 339, wherein this court held that the settlor of a trust did not save to himself any control over the economic benefits or the enjoyment of the property which he conveyed to a trust where he reserved to himself (as settlor) the power to supervise the investment of the trust funds, to vote any shares of stock held by the trustee, to control all leases executed by the trustee and to appoint successor trustees.

(c) The decision of the Circuit Court of Appeals for the Eighth Circuit is in direct conflict with the following decisions:

1. The decisions of the Circuit Court of Appeals for the Seventh Circuit in Commissioner v. Katz, 139 Fed. (2d) 102, and Commissioner v. Armour, 125 Fed. (2d) 467, in which cases the facts are almost identical in all respects with those in the case at bar;

2. The decisions of the Circuit Court of Appeals for the Tenth Circuit in Jones v. Norris, 122 Fed. (2d) 6, and

Armstrong v. Commissioner, 143 Fed. (2d) 700, in which cases the facts are very similar to those present in this case;

3. The decision of the Circuit Court of Appeals for the First Circuit in Commissioner v. Branch, 114 Fed. (2d) 985, holding that broad powers of control as trustee do not make a grantor taxable with the income of the trust created by him; and

4. The decision of the Circuit Court of Appeals for the Second Circuit in Phipps v. Commissioner, 137 Fed. (2d) 141.

(d) The decision is in direct conflict with the provisions of 26 U. S. C. A., Internal Revenue Code, Sections 161, 162 and 167 (c); and

(e) The question involved is one of great public importance. If the decision of the Court of Appeals for the Eighth Circuit is not reversed a great injustice will be done to many taxpayers who conveyed portions of their property to trusts, retained no possible economic enjoyment of any part of the income or corpus thus conveyed and are now confronted with taxation on the income therefrom, a result which might bankrupt some of them. In creating these trusts they relied upon the decisions of this Court and of the Circuit Courts of Appeal of various circuits and also upon the following decisions of the United States Tax Court which had been reviewed by all sixteen members of that Court and in which the Commissioner had acquiesced, to-wit:

Ayer v. Com., 45 B. T. A. 146;
Lowenstein v. Com., 3 T. C. 1133;
Small v. Com., 3 T. C. 1142;
Cherry v. Com., 3 T. C. 1171;
Banfield v. Com., 4 T. C. 29.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 13,014, Harry Edison, Petitioner, v. Commissioner of Internal Revenue, Respondent, and that the said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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